SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 133

MAJOR RAYMOND LISENBA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

PETITIONER'S REPLY BRIEF.

MORRIS LAVINE,
Counsel for Petitioner.

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MAJOR RAYMOND LISENBA (ROBERT S. JAMES),
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CLOSING BRIEF.

To the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices Thereof:

Respondent has filed a lengthy brief failing to meet the issues raised by this appeal, and overlooking or misstating essential facts disclosed by the record.

Nowhere has respondent pointed out any criminal agency to produce death by drowning. This is the *corpus delicti* in the case which must be proved beyond a reasonable doubt—(1) criminal agency as the means producing (2) death by drowning. And there is no such proof in the record. Only the extrajudicial statement of Hope that James told him that he, James, drowned Mrs. James, raises even a

suspicion in the actual evidence that any such thing occurred. There is no evidence of the fact itself.

That there was no scintilla of evidence of criminal agency until the Hope confession is conceded by respondent in its brief (R. Br. Pgs. 4 & 5) wherein it says:

"No prosecution was commenced for the crime of murder until May 6, 1936 (R. 815) *because proof of the criminal agency producing the death of Mary James was not discovered until after Hope was arrested and questioned on May 1, 1936* (R. 469, 630, 631)." Italics appellant's.

Respondent's brief recited from pages 1 to 29 a "recitation of the evidence" "without reference whatsoever to the contents of any alleged confession of James." This recitation contains no single fact upon which a conviction of murder *by drowning* could be sustained.

The respondent then adds:

> "The confessions proved James guilt of the murder of Mary James beyond peradventure."

It follows, therefore, that the conviction of James, and his sentence to death, was the result of the "third degree" confessions, wrung from James, and introduced in evidence against him. That his trial was unfair and un-American through the use of these confessions and through the spectacular and unnecessary bringing into the courtroom of live, hissing, writhing rattlesnakes, and the production of evidence from the State of Colorado more than a thousand miles away without notice and without an opportunity to defend against it, and the use of an accusatory statement as an implied admission of guilt when the defendant was without benefit of counsel, and the widespread use of evidence unrelated to this case but tending to degrade this

appellant in the eyes of the jury, is demonstrated by the voluminous record in this case.

And respondent deemed it necessary to use all of these unfair methods in order to obtain the conviction of appellant for murder *by drowning*.

Respondent spent much time in his brief to discuss James' interest in life insurance, the life and habits and rattles of rattlesnakes, the alleged incest charge, the episode with Madge Reed, and the Colorado evidence even to the point of diagramming it, and other irrelevant matters, none of which in any way prove or tend to prove *murder by drowning*, and all of which is immaterial to prove the issues before this Court, to-wit:

WAS PROCEDURAL DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION VIOLATED IN THIS CASE?

Procedural due process, says this court, speaking unanimously through Mr. Justice Hugo Black in *Chambers* v. *State of Florida*, 309 U. S. 227, 236, 237, "evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there has been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power."

Again the court says:

"We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The constitution proscribes such *lawless means irrespective of the end.*" Italics ours.

And in *Snyder* v. *Massachusetts*, 78 L. Ed. 695, Mr. Justice Roberts, in describing the true meaning of procedural due process says:

"A distinction has always been observed in the meaning of due process as affecting property rights, and as applying to procedure in the courts. In the former aspect the requirement is satisfied if no actual injury is inflicted and the substantial rights of the citizen are not infringed, the result rather than the means of reaching it is the important consideration. But where the conduct of a trial is involved, the guarantee of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way. Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules, and is not satisfied, if, though the hearing was unfair, the result is just."

We have pointed out in our opening brief how in the use of the alleged confessions, the bringing in of the live snakes, the use of Colorado evidence, the use of perjured testimony, and the deprivation of rights of counsel the case was not "fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power" and that certain fundamental rules of fairness were not observed.

Respondent has replied with a concentrated effort to prove the petitioner's guilt, rather than with the question of whether *due process* was observed in the trial and a fair trial accorded. We did not discuss this question of innocence in the opening brief, but lest silence be misunderstood, we will point to evidence that is convincing of appellant's innocence, and to the lack of evidence to overcome the presumption of innocence with which all persons charged with crime in America are clothed, and lack of competent legal evidence to satisfy anyone beyond a reasonable doubt such as the law requires before a guilty verdict can be sustained.

The Factual Misstatements by Respondent.

Misstatement No. 1.

Respondent charges petitioner with conjuring up the testimony that District Attorney Buron Fitts shortly before the confession threatened him. The record discloses the following:

> "Now prior to your making this statement down in the office of the District Attorney did you have any particular conversation with Mr. Fitts?
>
> "A. I did.
>
> "Q. What, if anything, did he say to you?
>
> "A. He was the one that was doing most of the talking. Do you want me to tell you what he said?
>
> "Q. Yes, tell us what he said. I don't believe you covered that fully.
>
> "A. Well, he read Hope's story over to me many, many, times and asked me what I knew about it, and I told him I knew nothing about it. He questioned me and questioned me about different things in Colorado, and everything else and I told him I knew nothing about it. He continued to question me until later on in the evening. I was very sick. I was hungry. I was tired, and I told him a thousand times that I didn't know anything about Hope's story. About 10:00 or 11:00 o'clock he began to get pretty rough with me. He said, 'Now you have heard the story over and over, and we are going to clean it up, and you had just as well tell me now, because we will be sitting here until Monday morning.' I still told him that I didn't know anything about the story; I had never heard of any rattlesnakes; I had never seen one, and that the whole story sounded screwy to me, and that I didn't understand the story. He told me that everybody in town was trying to storm the jail, that he had officers going around getting shotguns, going to keep the mob from lynching me. He tried to frighten me that way, and I told him that I didn't know anything about the story. About 12:00 o'clock all of the officers—there were about

> 15 or 20 around there all evening,—cleared the room and sent Mr. Jack Southard in to talk to me, and you heard me tell just what Jack Southard told me he was going to do if I didn't give them the statement, and admit the things they wanted me to admit. I didn't know the story. I had heard it. I had heard them tell it over and over and over, and when they told me that they was going to take me out to that house, and what they was going to do to me, I told them that if they wouldn't do it, I would try to tell them the story as I had heard it, and when I did try to tell them the story, every time I would get off the story one of the officers would stop me, and say, 'Didn't this or that happen?' which I had promised them I would tell if they didn't take me out there and punish me any more. * * * They (the statements) were given by me to end further questioning. There was none of it true" (R. 735-736).

When asked if he did not at the first appearance in court thereafter enter a plea of not guilty, the court sustained an objection to the question.

Respondent says the above statement was given for "the purpose of trying to bring his case within some of those which have been decided by this Honorable Court" (Resp. Br. 130). But respondent has forgotten that this case was tried in June and July of 1936 and judgment pronounced Sept. 10, 1936. No case at that time had been decided by this Honorable Court holding that confessions obtained by third degree methods violated the Fourteenth Amendment to the Constitution of the United States. *Brown* v. *Mississippi*, written by Mr. Chief Justice Hughes, was decided in 1937. *Chambers* v. *Florida*, and *White* v. *Texas*, written by Mr. Justice Hugo Black, and the *per curiam* decision on *Canty* v. *Alabama* were decided in 1939. Hence no thought could have or were given to these cases which had not even occurred when petitioner was already condemned to death.

But there was no denial by District Attorney Fitts either that he had threatened petitioner on this occasion or that he had questioned him continuously, going over the story over and over again, as James testified. In fact Officer Southard (R. 469-470) and Officer Killion testified to the continuous questioning in District Attorney Fitts' office (R. 674 *et seq.*), and the questioning lasted from three o'clock in the afternoon until 3 in the morning. Nor did Mr. Stewart, who claimed to be present most of the time while Fitts was questioning petitioner, deny these threats by Fitts, nor the repeated going over and over again of the story (R. 587 *et seq.*). Respondent was meticulous in having all other things denied. THESE STATEMENTS AND THREATS BY FITTS REMAIN UNDENIED BY HIM. Fitts did keep appellant out of jail and in his office without benefit of counsel and did persistently question him and browbeat him until the alleged confessions were forthcoming, corroborating in fact what James says he threatened to do until the confessions were forthcoming.

Misstatement No. 2.

Respondent says: "The evidence of the people given on voir dire examination overwhelmingly refutes the contention of petitioner herein made at the trial that he was beaten, threatened, frightened, questioned until he fainted, and confessed because of fear of a recurrence of such beatings. Such evidence further refuted his contention that he was deprived of sleep and food and of his right of counsel" (Resp. Br. pg. 32).

The record discloses as follows:

Was the Defendant Beaten?

Officer Southard admits that he struck James (R. 464). While on direct examination by petitioner's counsel he claimed it was "in the other case" (R. 464) he testified on

examination by the district attorney that the "slap" occurred when he was discussing the death of Mary James in the fish pond (R. 477). The slap was of sufficient degree for Officer Griffen to say "Take it easy Jack." according to Griffen's own testimony (R. 556).

The petitioner who denied making any remark as Southard claimed described the beating as follows:

> "Finally he (Southard) said that I was lying like a dog and he began to beat me * * * He jumped over and began to beat me, and I got hold of him, and he stopped, and then he jumped over and began beating me again. When I stopped him Charlie Griffen knocked me loose. I told them that I had answered every question, and I didn't know what they were talking about when they were talking about this woman. And he began to question me about it again, and then several minutes later he did it again, and I grabbed hold of him again and Charlie Griffen knocked me loose. I said, 'There is no use to beat me.' I told them if they wanted me to say that I stayed in the hotel with this woman I would say it. They were not satisfied with that. If they asked me a question, and if I answered it he hit me, and if I attempted to explain, or did not answer, he would hit me. And he turned me over in that chair several times" (R. 492).

James says he was black and blue from his waist up, that he was made hard of hearing, and both ears were swollen (R. 494).

Attorney Silverman, who saw James in the attorney room of the jail four or five days afterwards, observed that both of his ears were blue and swollen (R. 482).

Ethel Smith, who saw him in jail after his arrest and was two or three feet away, observed that one ear was very red and badly swollen and the other ear was real red (R. 512).

Officer Southard evasively admitted that the left ear might have been swollen some days after the arrest (R.

464), and Griffen said that James complained about his ears.

James says he got a hernia as a result of the beatings administered to him. Dr. James De Witt George said that he examined the defendant before he was lodged in jail and he had no hernia and he examined him in jail and he had a hernia (R. 461-462).

James complained to Chief Deputy District Attorney Stewart that he had been struck (R. 594).

James also said, "Well, they finally quit beating me some time in the night, and then Mr. Williams takes hold of me and told me if I confessed I would get less punishment, and that I might get a life sentence. I told him that I couldn't tell him anything about it" (R. 492, 493).

Was James Threatened?

It was a threat to take James next door to a private house instead of before the nearest and most accessible magistrate as required by Section 849 of the Penal Code of California.

It was a threat to keep him in this house for two days and nights, except when he was taken to the district attorney's office friendless, without counsel, and questioned incessantly, instead of being booked in jail.

It was a threat to keep him seated in a chair for two days and nights without sleep.

It was a threat to question him in relays of four hours each.

It was a threat not to send for counsel as first requested.

It was a threat, when on May 2, 1936, petitioner was removed from his cell to a private room called the Chaplain's room, not to notify his counsel or have such counsel present, and then to bring Charles Hope into the room, handcuffed to Southard, and to accuse petitioner of the

alleged crime. (See *Bram* v. *U. S.*, 168 U. S. 557; 42 L. Ed. 558.)

It was a threat to take James from the jail in custody of the officers to the unhappy scene where James' wife had been found drowned in the fish pond—a scene which originally necessitated calling the doctor to give James treatment because he was so sick, and his grief so great. (See *Ziang Sung Wan*, 266 U. S. 1; 69 L. Ed. 131.)

It was a threat to take him to the district attorney's office and question him incessantly thereafter, until he called for food and promised to tell the "story" if they would take him out and buy him some dinner.

It was a threat that District Attorney Fitts uttered that he would keep him there until Monday unless he told the story and that he kept repeating the story over and over again (R. 734) and undenied by Fitts.

It was a threat that Southard told petitioner he might just as well confess killing his wife or they were "going to beat the Hell out of" him (R. 489). (See cases cited in *Bram* v. *U. S.*, 168 U. S. 557; 42 L. Ed. 588.)

Mr. Fitts at no time denied that he made threats to James, as James claimed, nor did anyone else deny that Fitts had made them. The fact of the beatings having been so well established that fact itself is a corroboration of James' testimony regarding the threats.

Officer Southard admits that Fitts said to James in substance that James had better clear the whole thing up and save a lot of expense, but Southard claimed that Fitts' statement was made with reference to another case (R. 468).

Was James Frightened?

James testified as follows: "Every time: * * * every time I would get off the story one of the officers would stop me, and say, 'Didn't this or that happen?' which I had

promised them I would tell if they didn't take me out there and punish me any more (R. 735).

He also testified on *voir dire* examination: "I told him (Southard) that I was ill from the beating that I had taken before, that I wasn't able to take another beating and that if he wanted me to say what he was relating to me in Hope's story there that I would gladly admit it and save myself other punishment" (R. 497).

Since James was severely beaten and threatened it requires no corroboration of his own testimony to deduce that he was frightened. The testimony of several officers that James appeared cool and collected and calmer than they were would leave the necessary inference that none of them were calm. The fact that there were from fifteen to twenty officers all around this helpless man, whom Dr. Paul Bowers testified was of sub-normal mentality, and that he was fearful and alone in the face of most grave accusations, and that the men who had beaten and threatened him were present, was sufficient to frighten him or any individual in his same position.

Was James Questioned Until He Fainted?

James testified as follows:

"Q. And how long after talking to Mr. Williams, how long was it after that that you were taken to the County jail?

A. About the time that Mr. Williams got through talking to me I collapsed, and I didn't know anything until the next day.

Q. You mean that you fainted?

A. Yes, I fainted, or passed out.

Q. At what time the next day, as near as you can tell us, was it that you regained consciousness?

A. Well, I came to the next morning. I think it must have been 8:00 or 9:00 o'clock.

Q. Were you at the same place?

A. Yes, sir.

Q. Were the same people there?

A. Well, I don't just remember who was there. There was an officer named Davis there. Whether Mr. Southard and Griffen were there, I don't know.

Q. Now, were any further threats made to get you to make a statement concerning the facts of your wife's death while you were at the house—we have got to the point now where you regained consciousness——

* * * * * * *

Q. Were any further questions asked you by anyone concerning the circumstances of your wife's death, after you regained consciousness, and before you were taken to the County jail?

A. Well, I was pretty groggy when I regained consciousness, and I hardly remember what was said there" (R. 493).

Officer Southard himself furnished some measure of corroboration when he said that James in answer to some of his questions "just looked at me blankly." Later Officer Davis, in answer to a question by defense counsel, testified as follows:

"Q. And it is a fact, is it not, that as he sat in this chair and he put his feet on another chair, the man finally fell over and went to sleep, that is a fact, isn't it? * * *

A. I will say that he went to sleep. He didn't fall over" (R. 584).

This at least is corroborative of the fact that at four o'clock in the morning, while still sitting on a chair, the defendant, from sheer exhaustion had passed out. James had been questioned in relays of four-hour shifts. The start of the interrogation and the psychology of the attempted fright

upon James was initiated when he was first arrested, and when Southard took "quite a crowd" to James' house to make his arrest (R. 480).

Officer Southard said as follows:

"Q. Now, you spoke about taking Mr. James from the house where he was living to the house adjoining where he was living, where you had some dictograph.

A. Where we had the receiving set of the dictograph.

Q. Who was with you at that time?

A. There was quite a crowd. There was a number of newspaper men. Mr. Fitts was there, and Deputy District Attorney Eugene Williams, Scott Littleton, Everett Davis, I believe was there, and Harry Dean.

Q. Do you mean that all those people were there at the time the arrest was made?

A. Well, I had quite a crowd out there to make the arrest, yes, sir; it was quite a large house to cover" (R. 480).

The questioning continued in relays of four hours each. Officers occupied the beds in the front part of the house, and took turns in sleeping and interrogating James. All of them were members of the District Attorney's staff. Griffen and Southard occupied the front bedrooms; the other officers were in separate bedrooms in the middle of the house (R. 585). Various officers came in and took turns in relieving the officers who were questioning James. These included Lieutenant Kynette of the Los Angeles Police Department, who came there at six or six-thirty in the morning and went out with Davis and the officers and the defendant (R. 586). Hence, James was actually subjected to questioning by officers, in relays, from shortly after the time of his arrest for at least 48 hours, excepting only at most about two and one-half hours after he fell asleep from sheer exhaustion.

On May 2nd at about eleven or eleven-thirty, Deputy

District Attorney Williams, in charge of the prosecution of the case, came to the county jail and had James removed from the "High Power Tank" to the office of the jail Chaplain by Officer Killion, and James was there told of Hope's purported confession. This was in accordance with a plan which had been made before between investigators of the District Attorney's office and Mr. Williams (R. 621). James' attorney was not notified (R. 621). James had been instructed not to talk to anyone without Mr. Silverman being present (R. 482).

Mr. Williams and the squad of investigators persisted in their statement to James and took down his refusal to "add anything" to Hope's statement by a stenographer and in the presence of a group of investigators. Without notifying Silverman, James was then removed from the county jail by Officer Killion. The very first thing James did upon his removal from the jail was to ask Killion if they would give him something to eat. Officer Killion said he "remembered that we talked something about having something to eat, and we decided we didn't have time to stop for that" (R. 670).

James was taken to the scene of the fish pond. Silverman was not informed and no friend of James knew that he was taken there (R. 671). Mr. Williams was there at the fish pond and many newspaper men (R. 670). James was not told why he was being taken to this scene. He was taken back to the District Attorney's office by Killion (R. 673). There were many people in the room. James was asked to tell his side of the story.

The Trip to the Fish Pond Scene Where Mrs. James Died.

WILLARD L. KILLION testified:

Q. Now, you did get to 1329 Verdugo Road, I believe you stated heretofore. When you got there did you take Mr. James any place about the premises?

A. Yes, sir.

Q. Where did you take him?

A. To the back part of the premises near the garage and to the side of the fish pond.

Q. Did you have any conversation with him there at the fish pond?

A. As I recall it, the conversation had with him there was in asking him at what point on the edge of the pond—no, I am mistaken in that. It was Hope that was asked that question. I don't believe any conversation was had with Mr. James at the fish pond about it.

Q. You just took him out to where he could see the fish pond and came away, is that correct?

A. I do not wish to say no more conversation than that was held. Mr. Williams was there and many newspaper men and I do not wish to say that no conversation was held with him, but I do not remember any of the words that he said or that was said to him.

Q. Do you remember the substance of anything that was said to him there? (R. 670).

* * * * * * *

Q. Was he informed at any time on the way up, where he was being taken?

A. He was told that before we started from this building.

Q. Well, when you told him that, did you tell him why you were taking him up there?

A. No.

Q. And did you tell him why he was there while he was on the premises?

A. No, sir.

Q. And did you tell him why he had been taken there when he was on his way back?

A. I don't remember that.

Q. Did anyone—when I say "you", I mean it in the plural sense.

A. Not that I remember (R. 671).

Q. Now, Mr. Killion, you remained with the defendant after he was taken to the District Attorney's office, during all the time until he went out to eat?

A. On my second trip, you are still talking about?

Q. Yes.

A. Well, I remained in one or the other of the two rooms. I wasn't with him every minute of those hours I spent there, but the greater portion of the time I was with him.

Q. At any rate, you accompanied him up to the room where he was in the District Attorney's office?

A. Yes sir, I did.

Q. And after getting there you remained there with him for some considerable period of time before you went out?

A. That is true.

Q. And during that interval of time, before you left that room, there were other people in the room also?

A. Yes, sir.

Q. And they were not just sitting there saying nothing?

A. No, sir.

Q. They were talking to Mr. James, weren't they?

A. Yes, sir.

Q. Now, you go ahead and tell us everything that was said to Mr. James up to the time that you first left the room? (R. 673).

A. Well, I will be unable to say which person said a certain thing, but, of course, I can remember about what was said in substance by some one of us.

Q. All right; just go ahead and tell us what your recollection is.

A. Well, he had been told that Mr. Hope had told the story of Mr. James' wife's death, and he was asked if he didn't want to tell his side of the story.

. . . . . .

Q. Who asked him, if you remember?

A. I suspect all of us did at different times during this conversation.

Q. When he was asked to tell his side of the story the first time, what did he say?

A. I think he said that "That guy", referring to Hope (R. 674), "is a damn liar and if you are going for that business", or words to that effect, "you will have to do it." As I recall, that was his reply.

Q. Did anyone reply to that?

A. Well, I can't remember as to that particular question. I mean I don't remember whether anyone replied to that particular thing or not.

Q. Well then—of course, it is impossible for you to give the conversation in sequence, just as it occurred, but just go on and tell us what else you can remember that was said to him in that conversation.

A. Well, it was a *long conversation.* (Italics ours.) (R. 675.) It was broken at intervals by some silence.

Q. Just a moment When you say it was broken at intervals by some silence, do you mean that there were some times when Mr. James just quit answering questions?

A. No, I don't mean that at all. I mean, as you have intimated, *that there was questioning for several hours* (italics ours), (R. 675) and during those several hours there were many times when nothing was said by James or by the other people who were present.

Q. All right. Now, let's have any of the other things that were said to him, if you remember.

A. Well, he was asked questions as to things about his wife's death. As I remember it, he might have been asked "Well, what did you do with the snakes? Where did you get the snakes and where did you go on a certain occasion?" and matters of that sort.

Q. Now, he denied getting any snakes, didn't he?

A. Yes, he did.

Q. And when he denied getting the snakes, some question after such denial, would be asked him as to what he did with the snakes.

Q. His questioners kept on assuming that he got the snakes, during that entire time, didn't they?

A. Well, I don't know what the other questioners did.

Q. You heard them, didn't you?

A. Yes, but I don't know what they assumed.

Q. During that period was he asked anything about his wife's body being in the fish pond?

A. Yes, sir.

Q. What was he asked about that?

A. I can't tell you, in words.

Q. Well, give me the substance, as nearly as you can.

A. He was asked when the body was put in the fish pond and by whom.

Q. He told you he didn't know, didn't he?

A. Well, in substance, yes.

Q. He wasn't there?

A. That is what he said (R. 676).

Q. And when he said that did anyone tell him that he was a liar?

A. No, sir.

Q. Did anyone tell him that they had the goods on him?

A. No, sir.

Q. Then what were some of the other things that were asked him?

A. Well, if this is a satisfactory answer, *about everything that is in Hope's story was asked him.* (R. 676), (Italics ours).

Q. And he denied every bit of it, didn't he?

A. No, I wouldn't say every bit.

Q. What do you remember that he didn't deny first?

A. Well, he admitted that he knew Hope and that Hope had been up there and he said that Hope was a medical student and that Hope had used his automobile on different occasions. Those were some of the things that I remember that he didn't deny.

Q. But he did deny having discussed killing his wife with Hope, didn't he?

A. Yes, he did.

Q. He denied being in any way concerned with his wife's death, didn't he?

A. Yes, he did.

Q. He denied being in any way concerned with his wife's death, didn't he?

A. Yes.

Q. He denied all knowledge of her being dead until her body was found in the fish pond, didn't he?

A. Well, I don't know that that was asked him. In substance, I suppose he did.

Q. He denied having any wish to see his wife's death, didn't he?

A. I suppose in thought, at least, he did. I don't know that that was asked him.

Q. He stated that he loved his wife, didn't he?

A. I don't think he did on that occasion, no.

Q. Well, now, the answer that you gave a moment ago, when he was asked nearly everything concerning the matter, covers the whole conversation up to about the time that he went out to dinner?

A. As I remember it, it does.

Q. What was said to him just before he said that he would make a statement?

A. He called to me. At that particular time there was no one in the room except Mr. Gray, Mr. Hope and myself.

Q. Mr. Hope do you mean?

A. Mr. James, Mr. Gray and myself. The three of us were the only people in the room. Mr. James said, "Say, *can't we go out and get something to eat* (R. 677, italics ours) and I will tell you the story?"

Q. Now, it had been prearranged that you and Mr. Gray would be left alone in that room with Mr. James, hadn't it?

A. No, I am sure it had not.

Q. If it had, you had no knowledge of it?

A. That is right. • • •

Q. You and Mr. Gray had been out of the room for some interval of time, and both came back just before he said this?

A. No, that isn't true. We had been in the room for some time, but the other persons who had been in the room with us had departed.

Q. How long would you say you and Mr. Gray and Mr. James were in the room there alone before he said this?

A. I would say five or ten minutes.

Mr. Clark: I hope your Honor will indulge me this one purpose:

Q. Will you tell me once more, and just as nearly as you can remember in the words used by Mr. James, what it was that he said in regard to making a statement? I don't want to suggest or intimate anything in my question. I want it to come from you as nearly as you can reproduce the words.

A. In substance—I can't remember the words, but in substance he said, "Can't we go out and get something to eat?"

Q. Is that all?

A. Just a moment.

Q. Pardon me. I didn't mean to interrupt you.

A. Or to the effect that, "If you fellows—" and I got it from that that he meant Mr. Gray and me— "—will take

me out to eat now," he said, "I will tell you the story" (R. 678).

It will thus be seen from the testimony of Killion that James at first denied the story of Hope and kept denying that he had killed his wife until midnight when he asked the officers "will you take me out to eat now? I will tell you the story" (R. 678).

James said that around six o'clock the officers were served with sandwiches and coffee, but that he received none (R. 506). He said he had himself sent someone out to buy a couple of sandwiches for him, but somebody ate them before the sandwiches got to him. Officers told James that the deputy ate them (R. 506). Deputy District Attorney Robert Stewart testified that he did not see the sandwiches as he went out about that time and got one himself because he had been left out of the sandwiches (R. 591). No other officer testified to James having eaten any sandwiches. It was not until after James was taken out for a beefsteak on the promise that he would tell "the story" that the informal confession was given to Killion which was followed by the more formal one to District Attorney Fitts, both of which were used in evidence to bring about the conviction of the appellant.

The record thus overwhelmingly supports the statements that James was beaten, threatened, frightened, questioned until he fainted, and only confessed because of fear of a recurrence of such beatings, and further establishes the fact that he was deprived of sleep and food and of his right of counsel.

With reference to the matter of his counsel, we point to the fact that the interrogation commenced on a Saturday, shortly before noon, a time when attorneys generally leave the city for the weekend. The District Attorney knew where Mr. Silverman was located,—that is, that he was at Murrieta Hot Springs, a matter of about two and a half

hours ordinary traveling time from Los Angeles. There was therefore no reason why, if the District Attorney was in good faith in the matter of having the defendant represented, he could not wait until James' counsel could be present. But James did not stop with asking for Mr. Silverman,—he asked for Mr. Parsons (R. 625). Mr. Parsons was not communicated with (R. 626). The record further discloses that when James was first arrested he asked Southard at the time when he was first taken to the District Attorney's office, right after his arrest, to get in touch with Silverman (R. 466). It does not appear however that anyone attempted to get in touch with him, and no explanation was given as to why this was not done.

Respondent's brief says that Silverman talked to James on Monday (R. 571), but this apparently is erroneous, the record not being clear and Silverman reprimanded by the court for attempting to explain his effort to see his client (R. 483). James was taken there early Sunday morning, and was then taken to the house next door where he was continuously plied with questions in relays of four hours each, and on Monday Deputy District Attorney Williams visited him at the private house where he was being unlawfully detained. It also appears from Silverman's own testimony that he did not see James until Tuesday, April 21st (the prosecutor's questions would so indicate, R. 482), when James was arraigned in court, and then only during the arraignment and not for consultation purposes, and that Silverman did not have an opportunity to consult with James until April 25th. Officer Southard was confused as to times and dates. He says he did not think he booked James until April 22nd (Wednesday) (R. 467), whereas from all the other testimony it appears that he was booked on April 21st.

Thus we see that every statement of fact upon which respondent bases his claim that there was "no force, vio-

lence, threats, coercion, or any unlawful means employed" (R. 31) is belied by the record. Thus the "chronological order of events" which respondent sets up leaves much to be added and corrected by reference to the testimony itself, as shown by the record.

While it is admitted that James was not taken before a magistrate for a period of at least 48 hours after his arrest, and contrary to the laws of the State of California, which laws are a safeguard to the defendant to enable him to get counsel promptly, and while it is further conceded that Los Angeles had night courts at the time of this case which were open on Sundays and until at least one o'clock in the morning, and that James was not arraigned before any magistrate that day nor the next, and not until the day following, and then not on the charge for which he is here on trial until seventeen days thereafter, it is respondent's contention that even though Southard struck him, due process of law was not violated because the alleged confession was not made for eleven days thereafter. But respondent forgets that once having created a state of fright in the mind of the defendant it is presumed that this fright continues until it be affirmatively established by the prosecution that influences under which the defendant was first held had ceased to operate upon his mind.

In several cases where a confession was obtained from the defendant under threats or coercion and a subsequent confession was obtained without threats or coercion it has been held that the controlling influence which produced the prior confession is presumed to continue until its cessation is affirmatively shown, and evidence to overcome or rebut this presumption must be very clear, strong and satisfactory. If there is any doubt on this point the confession must be excluded. In the case of *People* v. *Johnson*, 41 Cal. 452, at 455, the Court said:

"The law presumes the subsequent confession to have

been made and influenced by the same hopes and fears as the first, and this presumption continues until it be affirmatively established by the prosecution that the influence under which the original confession was made had ceased to operate before the subsequent confession was made. (*State* v. *Roberts*, 1 Dev. 259; *Peter* v. *State*, 4 Sm. & Marsh, 3; *State* v. *Gould*, 5 Halstead 163; *Deathridge* v. *State*, 1 Sneed 75; 2 Russ. on Cr. 834; 1 Wharton Am. Cr. Law, Sec. 694.)

In the instant case no first confession was obtained which emphasizes the fact that the defendant had no intention of confessing. This is re-emphasized by the fact that immediately after Williams first saw him on May 2nd he refused to add to Hope's story and denied that story to the officers and others who had taken him to the scene of the fish pond. It was only after he was refused food and was intensively questioned until midnight that the alleged confession commenced to "crack."

3. Error as to Deprivation of Right of Counsel.

Respondent says, "The record does not bear out petitioner's assertions that he was held incommunicado for two days and nights in a private home without being taken before the nearest and most accessible magistrate and without being allowed counsel of his choice." (Resp. Br. 39.)

The record discloses that petitioner was arrested Sunday morning about 9 a. m. (R. 559), that he was then taken to the house next door (R. 560), then taken to the district attorney's office (R. 560), and then taken back to the torture house next door where the questioning started in relays. Being arrested without a warrant Section 849 of the Penal Code of California required that he be taken before the nearest and most accessible magistrate. Los Angeles at the time of this case had day and night courts open Sunday with a magistrate presiding (R. 458). He was not taken be-

fore the magistrate and no complaint was filed (R. 570). The defendant asked to see Mr. Silverman when he first went to the District Attorney's office (R. 466), (R. 487). He gave Mr. Fitts Mr. Silverman's telephone number (R. 487). Mr. Silverman saw him first in court on April 21, 1936 during arraignment period when a large number of men are brought down from the jail and returned after arraignment, and no opportunity is afforded for consultation. He consulted James first on April 25, 1936 (R. 483). Petitioner was then kept in the "High power" tank (R. 597).

On Saturday May 2, 1936, shortly before noon, the district attorney, and investigating officers, then being on notice that James had counsel of his choice (R. 621), entered the county jail, removed James from his cell to the chaplain's room, sat him down opposite a stenographer, and across from Southard, the man who had struck him, brought Hope in handcuffed, and there accused him with a purported statement of Hope's. Silverman, his counsel, was not there, nor had he been notified.

Shortly thereafter the prosecuting officer secured a court order for the removal of James from the jail without notification to defendant's counsel, Mr. Silverman (R. 623)

The petitioner was thereafter taken to the scene where his wife died, but without the presence of his attorney, Mr. Silverman, and without friends (R. 624).

Thereafter he was taken to the District Attorney's office, where he requested that Mr. Silverman be contacted. He was told that Mr. Silverman was at Murrieta Hot Springs, about two and a half hours traveling time from Los Angeles. The investigation, and interrogation was not delayed to await Mr. Silverman (R. 625).

The petitioner asked for another attorney, Mr. Parsons, but Mr. Parsons was not communicated with (R. 626). The interrogation continued right on without counsel and without waiting for counsel.

4. Errors Regarding Facts Relating to Rattlesnakes.

Respondent says that Autopsy Physician Wagner "when he again examined the deceased's body following its disinterment he was of the opinion that the laceration on the deceased's toe was caused by a rattlesnake bite" (Resp. Br. 35). This is erroneous.

When Dr. Wagner was asked whether he had reached any conclusion as to what caused the incision on the toe of the deceased, he replied, "Not a definite one, no sir" (R. 98).

Pressed further, he admitted he had never been bitten by a rattlesnake nor had he *ever* seen anyone bitten, and that the laceration could have been made by a rattlesnake or *anything else* that would have a similar instrument for making such a puncture laceration" (R. 99. Also R. 999.) (See full discussion in R. 999 by Justice Seawell.)

Dr. Gustave Boehme, according to respondent's brief (Resp. Br. 35) gave similar evidence.

Dr. Boehme limited his testimony to *probabilities* only and said that the laceration could have been caused by laceration, it could have been caused by snake bite, it could have been caused by some other method. "So far as the wound itself was concerned, it could have been caused by a number of different things (R. 110; also full discussion in R. 1000).

Respondent has failed to point out how the "identical snakes tended to corroborate the testimony of the prosecution witness."

Why wouldn't any other two snakes do the same thing?

Besides, it was not claimed there were two snakes in the box that Hope claimed the foot of Mrs. James was placed, but only one. Hence, why two "identical" snakes? Hope says he bought three snakes from Mr. Kirby (R. 62, 131) and took them to his own apartment and kept them for a couple of days (R. 63) and delivered them to James, and that appellant expressed himself as dissatisfied. He now

speaks of putting the "two snakes" in a box (R. 66). What happened to the third?

5. Errors Regarding Colorado Evidence.

Respondent concedes that California law does not require notice of the use of such evidence as was produced in this case from the State of Colorado (Resp. Br. 36). He states that such evidence did not come without notice to petitioner because while he was under arrest he was questioned about it! (Resp. Br. 36).

He further says that the request for continuance was denied "for insufficient showing therefore, as required by the law of California, namely, the filing of affidavits in support of such motion for continuance, setting forth facts warranting the trial court in granting such application."

We do not understand the trial court to so hold the insufficient showing. The trial court permitted, in lieu of affidavits, the taking of testimony. James then took the stand and testified and the letter received from the proposed witness was testified to.

But the insufficient showing, as we construe it, was in not being able to set forth in affidavit or testimony, what the witness would testify to—a fact that could only be secured in the State of Colorado where the witness was located (R. 687-690).

Respondent's brief also says: "Where one is charged with murder it is within the discretion of the trial court to permit the introduction of evidence tending to establish a prior murder where the proof of such prior murder tends to throw light upon a particular fact, or explain the conduct of a particular person, which fact or conduct has a bearing upon some issue in the case for which the defendant is on trial (Resp. Br. 37).

We do not so understand the law to be: *Peo.* v. *Hartman*, 62 Cal. 562; *Peo.* v. *Lenon*, 79 Cal. 625; *Peo.* v. *Bishop*, 81

Cal. 113; *Peo.* v. *Stewart*, 85 Cal. 174; *Peo.* v. *Hurley*, 126 Cal. 351; *Peo.* v. *Koller*, 142 Cal. 621; *Peo.* v. *Jones*, 31 Cal. 565; *Peo.* v. *Lane*, 100 Cal. 379; *Peo.* v. *Martin*, 50 Cal. Ap. 71; *Peo.* v. *Gilliland*, 103 Pac. (2) 179; 101 C. A. D. 687.

Respondent says: "Where it is claimed by the accused that the act in question was innocently or accidentally done, or done by mistake, or where the evidence is susceptible to such an inference, proof of such other act" is admissible, etc. But in this case it was not claimed that the defense was that the defendant did anything innocently or accidentally or by mistake that caused the death of Mrs. James. No such issue was here involved.

6. Hope's Affidavits That He Committed Perjury and the Conviction Rested on Perjured Testimony.

It is conceded by the Respondent that it was the duty of the Supreme Court of California to consider the Hope affidavits, if not on rehearing, then by *Habeas Corpus* (Resp. Br. 38). Hope's affidavits that he committed perjury at the trial, that the snake stories were "all the bunk," that he testified under threats, and that the prosecuting officers knew his testimony was perjured, were filed on his petition for rehearing pursuant to possible authority vested in the California courts under Article VI Sec. 4¾ of the Constitution of California and Sec. 956a Code of Civil Procedure of the State of California and Rules 38 of the Supreme Court of California to take additional evidence and make different findings "in the interests of justice" while the case is pending on appeal. The petition for rehearing containing the affidavits and petition to take additional evidence was served on the adverse party, but there was no counteraffidavit or answer filed.

Because the import and meaning of these California constitutional and statutory proceedings have never been ap-

plied or construed by the California courts in a situation such as this case, where trial by jury has been had, appellant filed at the time said petition for rehearing was still pending and undetermined, a petition for a writ of *habeas corpus* pursuant to authority set forth in the case of *Mooney* v. *Holohan* decided by this court.

Respondent concedes that the California court therefore considered these affidavits, but resolved against them because of the evidence produced at the trial "which was entirely in conflict with the Hope affidavits."

On motion for new trial an affidavit was filed by R. E. Parsons, one of the attorneys in the case, that Scott Littleton, investigator in the case, who sat at the district attorney's table throughout the trial, had written a magazine article in which he said regarding getting Hope's statements:

"On the way we tried to get over to him the idea that the more he talked the better his chances would be of escaping the rope. * * *

"At three o'clock the following morning we had dug out of Chuck Hope, ex-sailor and floor finisher, a story that Poe might have imagined" (R. 826).

7. Hope's Fantasy. The Rattlesnake Myth.

Hope had told James he spent all his life "fooling with dope" (R. 769). That he was an inordinate drinker was testified to by his own admissions and other people who saw him drunk.

No one besides Hope ever saw any snakes on the James premises. Mrs. Eva Murphy of Alabama, who was visiting her brother, the petitioner, when Hope said he left snakes there, did not see any (R. 761).

The physical facts of the case belie Hope's fantastic story. Hope said Mrs. James had on a nightgown (R. 75). When

her body was found the Pembertons said she had on pajamas, and bedroom slippers (R. 10).

Hope says Mrs. James was made drunk, yet there was no alcohol in her bloodstream (R. 103), *nor was there any poison in her system*, according to Dr. Wagner, the autopsy surgeon.

The effect of rattlesnake poison on the system was shown in experimentation upon guinea pigs by Dr. Boehme (R. 115; R. 1001), resulting in a large amount of blood in the lungs and contraction of the heart, none of which conditions existed in Mrs. James whose heart and lungs were normal (See discussion by Justice Seawell, R. 1001).

Mrs. James had a single laceration of her left toe. A snake punctures, like a hypodermic, and does not lacerate or tear.

There was but a single laceration; a snake has two fangs in the upper part of its mouth.

Snake bites suppurate; there was none around this laceration.

To have been able to strike the foot in the position described by Hope the snake would have had to have been upside down and strike upwards.

Hope's story has many other inconsistencies. He said he took the snakes to his own apartment and kept them there a few days before delivering them to James (R. 63) and that he had no conversation with James when he delivered them (R. 63). He got paid for them before he delivered them (R. 64).

Hope says he bought two inches of tape for James and James taped her eyes and mouth with only two inches of tape. Yet Dr. Wagner says there were no marks of any tape being removed from the eyes or mouth (R. 108).

Hope says Mrs. James was tied down with rope. Yet Dr. Wagner says that a body, which bruises only before

death showed no bruise marks and such would be indicated where rope might have tied her.

Hope says that Mrs. James was dead by at least 4 a. m., August 5, 1935, yet they waited to carry her out until daylight 7 a. m. of that day.

Dr. Wagner says he performed the autopsy 3 p. m., August 6, 1935 (R. 99-100). The body had been dead from 12 to 24 hours (R. 101).

8. Other Facts Proving Defendant's Innocence.

The context of Mrs. James' note to her sister was such as could only have been written by a woman, and it states that it was "old blue Monday" as she was writing. According to Hope's story she was then dead (August 5, 1935, was Monday).

One of the insurance policies on Mrs. James was not delivered until that day, and there is no showing that James knew it was to be delivered, and if insurance was the motive, as contended by the respondent, James would have waited until he got the policy (R. 1039).

The uncontradicted testimony of the witness Dr. Alfred Dinsley, that he saw a woman, who could have been none other than Mrs. James, in her chicken yard hours after Hope said she was dead, wearing the colored garment described by the other witnesses. This testimony is corroborated by the fact that several persons were within the James dooryard at about nine o'clock in the morning and nobody saw her body on the cement walk (R. 1084).

Hope advised James to take Mrs. James to a hospital. "That the person whom they were attempting to kill should be taken by them to a hospital to be restored to health is too absurd to require comment."

The above is amply corroborative of Hope's affidavits that his story was "all the bunk" and was perjured, and that the judgment founded thereon should be set aside.

ARGUMENT.

Respondent, as we view it, has misconceived the scope and meaning of this court's decisions with reference to the use of third-degreed confessions.

This court, as we view it, has proscribed the use of this kind of evidence in any case in America as a protection to democracy, and has decreed that its use is violative of the Fourteenth Amendment to the Constitution of the United States.

It has held that dictatorships might use it to torture its victims and inflict punishments, but that in a free democracy its use must be abhorred and prohibited, not only by the highest court in the land, but by every other court that must follow its decisions.

The case at bar is like that of *Ziang Sung Wan* v. *U. S.*, 266 U. S. 1, cited by us and detailed by respondent in that this petitioner was on the eleventh day after his arrest taken to the scene of the alleged crime, shown the premises and various objects connected therewith, with several newspapermen and investigators present (no doubt to create a psychological fright) and thereafter questioned from 3 p. m. until 3 a. m. the following morning. The officers were too much in a hurry and too busy to buy anything to eat on the way out (R. 670).

Wan had been taken on the eighth day after his arrest to the scene of the crime, shown the various objects and premises connected with it and questioned from 7 p. m. until 5 a. m.

The case of *Bram* v. *U. S.*, 168 U. S. 532, 42 L. Ed. 568, is very much in point. In that case the defendant was told that another member of the crew had accused him, Bram, of the murder, and that if he had an accomplice he should tell it. Bram, denying that he had committed the murder,

blamed another. He was then under arrest. The confession was excluded. This case contains an analysis of many others, and we shall refer to this case more in detail later.

The Accusatory Statement.

In California, as pointed out in respondent's brief, silence to an accusatory statement, even where the person is under arrest and has been advised by counsel not to talk, can be used against the accused as an implied admission of guilt. It forms the necessary corroboration required by law (Sec. 1111 Penal Code of California) to support the statements of an accomplice, whose testimony is insufficient unless corroborated.

We have challenged the use of such proceedings as violative of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

It constituted securing an implied confession by threats and intimidation. The proceeding here outlined enables the prosecutor to do indirectly, what he could not do directly. It enables him to accuse the defendant in custody and under the protection of the law, and even under advice of counsel not to speak, and to use his, the prosecutor's hearsay statement of the accusation made by a co-defendant, and the failure of the accused to reply, as an implied admission of guilt. We cannot believe that this is due process, or a fair trial in the American way.

Bram v. *U. S.*, 168 U. S. 532.
Powell v. *Alabama*, 287 U. S. 45, 52.
Peo. v. *Pfanschmidt*, 262 Ill. 411.
Peo. v. *Conrow*, 200 N. Y. 356, 93 N. E. 943.

In *Cody* v. *U. S.*, 25 Fed. (2) 299, the court said:

"but after the arrest and during an official examination, while respondent is in custody, it is common

> knowledge that he has a right to say nothing. Only under peculiar circumstances can there seem to be any duty then to speak. Lacking such circumstances, to draw a derogatory inference from mere silence is to compel respondent to testify."

This is but an attempt to "trap him into fatal contradictions" condemned in *Brown* v. *Walker*, 161 U. S. 596.

Look at the situation. James is taken from his "High power" tank to a private room. No counselor or friend was present. Several officers came in. Officer Southard who struck him is there. Hope is handcuffed to the officer. A stenographer is present. The prosecuting officer, with all the authority of the law, enters with others. He is accused in the presence of all of them. He is asked, if he has anything to "add" to the story. He answers nothing, and that is taken as an implied admission of guilt sufficient to corroborate Hope's fantastic story.

Could anything be more violative of his constitutional rights?

In *United States* v. *Wrenn*, XXI Canadian Criminal Cases 119, 121 (Available Library of Congress), the court, in rejecting the testimony between a detective and a prisoner in the county jail, said:

> "The practice of detectives interviewing a prisoner when in jail and no one else is present at the interview should be discouraged. * * * the jailer should not permit private interviews between a crown detective and a prisoner.
>
> "The detective in this instance, being alone with the prisoner, first tells him there is a 'pretty strong' case against him and then presses him with questions."

The court condemned this practice as leading to untrustworthy results and injustice to the prisoner.

In *Boyd* v. *United States*, 116 U. S. 616 (29; 746) attention was called to the intimate relation existing between the pro-

vision of the 5th Amendment securing one accused against being compelled to testify against himself, and those of the 4th Amendment, protecting against unreasonable searches and seizures; and it was in that case demonstrated that both of these amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change. In commencing on the same subject, in *Brown* v. *Walker*, 161 U. S. 596 (40; 821), the court, speaking through Mr. Justice Brown, said:

"The maxim *Nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquistorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be

founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly imbedded in English as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."

There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was imbedded in that system as one of its great and distinguishing attributes.

In *Burrowes* v. *High Commission Court* (1616), Bulst. 49, Lord Coke makes reference to two decisions of the courts of common law as early as the reign of Queen Elizabeth, wherein it was decided that the right of a party not to be violated by the ecclesiastical courts. Whatever, after that date, may have been the departure in practice from this principle of the common law (Taylor, Ev. Sec. 886), certain it is that, without a statute so commanding, in *Felton's Case* (1628), 3 How. St. Tr. 371, the judges unanimously resolved, on the question being submitted to them by the King, that "no such punishment as torture by the rack was known or allowed by our law."

In *Purpura* v. *United States*, 262 F. 473, 475, the court said: "It is well settled that, to render a confession admissible, it must clearly appear that it was free and voluntary, and that the witness was not influenced by threats, violence, or by any implied or direct promises—in other

words, it should clearly appear that the confession was not due to any improper influence by those seeking to obtain the same". When one is arraigned on a criminal charge, the law presumes that he is innocent until the contrary is shown by evidence sufficient to convince the jury beyond a reasonable doubt as to his guilt. Therefore it is highly important in a case like the one at bar that this right should be preserved, and that only confessions should be admitted where it clearly appears that it was the free act of the defendant, without any inducement, threat or other influence.

In 2 Hawkins, Pleas of the Crown (8th Ed.) p. 595, Sec. 34, there is an admirable statement of the law upon this subject, which is as follows:

> "And as the human mind under the pressure of calamity is easily seduced, and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail, a confession, whether made upon an official examination, or in discourse with private persons, which is obtained from a defendant either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction."

The following from 3 Russell on Crimes (6th Ed.) 478, we think is a clear statement of the record:

> "But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. * * * A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the

prisoner, and therefore excludes the declaration if any degree of influence has been exerted."

The case of *Bram* v. *United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, is very much in point—indeed, we think it is practically on all fours with the case at bar. There it appears that the defendant, who was the first officer of the ship of which the deceased was the captain, was charged with the murder of the captain on the high seas. The alleged confession was supposed to have been made to a detective at a time when the defendant was under arrest. The detective testified that no threats were made or any inducements held out to him. On this point the witness was interrogated by the court, and testified as follows:

"Q. You say there was no inducement to him in the way of promise or expectation of advantage? A. Not any, your honor.

"Q. Held out? A. Not any, your honor.

"Q. Nor anything said, in the way of suggestion to him that he might suffer if he did not—that it might be worse for him? A. No, sir; not any.

"Q. So far as you were concerned, it was entirely voluntary? A. Voluntary, indeed.

"Q. No influence on your part exerted to persuade him one way or the other? A. None whatever, sir; none whatever."

Thereafter the witness on cross-examination answered the following question, "What did you say to him, and he to you?" to which the witness answered as follows:

"When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me; where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said: 'Now, look here, Bram; I am

satisfied that you killed the captain from all I have heard from Mr. Brown. But, 'I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies.

"Q. Anything further said by either of you? A. No; there was nothing further said on that occasion."

In that case the Supreme Court said:

"'The law cannot measure the force of the influence used or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.' In the case before us we find that an influence was exerted, and as any doubt as to whether the confession was voluntary must be determined in favor of the accused, we cannot escape the conclusion that error was committed by the trial court in admitting the confession under the circumstances disclosed by the record."

In the case of *Sorenson et al.*, v. *United States*, 143 Fed. 820-824, 74 C. C. A. 468, 472, the court said:

"The confessions in the case before this court were made to an inspector while the defendants were prisoners under his control. He stated to one of them that he had an absolutely good case against him, and to both that the thing for them to do was to plead guilty and to throw themselves on the mercy of the court, and the matter would probably be overlooked in the state court. Tried by the decision of the Supreme Court in *Bram's* case, either of these statements was 'legally sufficient to engender in the mind of the accused hope or fear in respect of the crime charged,' and each of them rendered the subsequent confession involuntary and inadmissible in evidence."

In this instance, as we have stated, the testimony shows that defendant for a period of almost 24 hours, excluding the time he was asleep, was continuously plied with questions by these five inspectors and all manner of questions propounded to him about the circumstances under which the package in question was lost. It further appears that he was given no rest during this period, except when asleep; that he endeavored to communicate with friends for the purpose of employing counsel, and that he spent the night at the hotel under protest.

Under the circumstances, according to the testimony of the inspectors, we think this alleged confession is clearly inadmissible. This is true, independent of the testimony of the defendant; but in many respects, as we have said, the defendant's testimony is corroborated by that of the inspectors. In view of what we have said, the court below was in error in admitting this alleged confession, and therefore the judgment of the lower court should be reversed.

In *People* v. *Loper*, 159 Cal. 6, 112 Pac. 720, Ann. Cas. 1912B, 1193, where the length of examination does not appear, the court in holding the admission of a confession erroneous, said, *interalia:* "After his arrest, the defendant was submitted to a rigid examination by the sheriff, the district attorney, and others. On the following morning he made a confession, which his counsel contend was due not to his own voluntary impulse, but resulted from this close examination, characterized by them as 'a relentless sweating process.' * * * He was entitled to stand mute, if he chose to do so, and to have no confession save a voluntary statement—one not extorted by fear nor induced by promises—introduced against him at his trial. Of this right he was deprived. Without instruction as to the law applicable to his case, without advice of counsel, without knowing that his utterances might be used against him, he was cajoled, browbeaten, and persuaded; was called

'a monumental liar;' was told that Vernet's friends would have hanged him 'to the first tree' if the sheriff had taken him to the place where the dead body was found; and, in short, every sort of device was employed to force a confession from him. Then, to enable these persuasions to sink deeply into his mind, he was solitarily confined for the night. To say that the confession of the following morning was not influenced by the conduct and the conversation of the officers would be to contradict all human experience."

In *State* v. *Borello*, 161 Cal. 367, 37 L.R.A. (N.S.) 434, 119 Pac. 500, it was held that an alleged confession secured from one suspected of crime, by a protracted searching examination of public officials, who assumed a menacing and browbeating attitude, accompanied by threats, invective, false statements, and profanity, is not admissible in evidence against him. In this case the interview in question, at which were present the district attorney, the sheriff, the deputy sheriff, official stenographer, and a constable, lasted at least two hours and a half, although some of the parties testified that it lasted nearly five hours. The court said: "That a confession so extorted cannot be admitted in evidence is firmly established in the jurisprudence of this country."

In *People* v. *Quan Gim Gow*, 23 Cal. App. 507, 138 Pac. 918, where the length of the examination does not appear, the court held it to be erroneous to admit testimony of an alleged confession where, on the day of the arrest, the defendant was taken to the detective's office at the police station, and, in the presence of several officers, interrogated as to the killing of decedent. The court said, *inter alia:* "While no physical force was used and neither threats nor promises made, there can be no doubt at all but that the repeated questioning of the officers, like the constant dropping of water upon a rock, finally wore

through his mental resolution to remain silent. Admittedly, his refusal at first to answer incriminating questions gave evidence of a desire to make no statement. When did this unwillingness vanish and a desire to talk succeed it? Not after he had been given any period of time for reflection, for his inquisitors allowed him none. The examination was persisted in until a response was forthcoming, and under these circumstances it must be said that the responses appear to have been unwillingly made, and as a direct result of continued importuning."

In *People* v. *Clark*, 55 Cal. App. 42, 203 Pac. 781, where it was held that alleged admissions and confessions were improperly admitted, because not voluntary, the court said: "The showing made by appellant in support of her objection to the admission of this evidence was that, for a period of more than two weeks, the appellant was subjected to almost daily cross-examination by from two to four police officers, who, by 'mental suggestion composed of cajolery, flattery, assurances of good will and friendship, interspersed with brutal browbeating, accusations, indirect threats, and misrepresentation of facts,' and without advising her of her constitutional rights, or permitting her to have the benefit of counsel, were able to dominate and control the mind of appellant when she was in a state of physical and mental helplessness." The court pointed out that it was conceded that no specific promises of reward were made, but there were frequent assurances of the police matron to the effect that it was the best thing for the prisoner to tell the truth, and said further: "It is apparent from the testimony of the witnesses for the state that the relentless sweating process to which the appellant was subjected was such as to render her statements involuntary. She was put through a course of cross-examination continuing over a period of two weeks, when she was in such a low physical and mental condition that

she had to be assisted by matrons into the examination room, with her head covered with wet towels to keep her in a condition to answer the questions. These examinations lasted for hours at a time, during which time appellant was denied food or other nourishment."

Discussion of the Denial of Due Process on the Grounds of the Method of Obtaining the Informal and Formal Confession.

It is very evident that the District Attorney was bent on getting a confession in this case by any means whatsoever. It is equally clear that he intentionally and systematically used unlawful means to do so. The investigation started March 22nd, 1936, several months after the death of Mrs. James and after an insurance company agent had told James that if he sued for the recovery of the policy they would see he was hanged (R. 739). He did sue and on March 31st, 1936, Robert Herron, a shorthand reporter of the District Attorney's office was in Federal Court to take down James' testimony in the trial of that proceeding (R. 784). No fact or circumstance had at that time come to light which in any way indicated that James had killed Mrs. James. The circumstances regarding the finding of the body of Mrs. James drowned in the fish pond, her delicate condition of health, partly due to her pregnancy and the fact that she suffered from insomnia, were all known to the investigators.

It was for the purpose of trying to get something on James that a dictophone was installed in the house next door, which house was rented by the District Attorney's office and which later became James' private jail. Nothing incriminating came over the dictophone with reference to the murder charge, but on April 19th, 1936, it was deemed the psychological time to take James into custody and start working on him.

It is obvious that the accusation of incest against James at the time they were "working on him" to get a confession of murder was but another step in the threats and coercion which was being used upon James.

As a part of the plan of brow-beating and threatening this appellant into a confession of murder he was charged with the grave crime of incest with his niece. No facts regarding this incest charge appear in this record other than that James evidently denied the charge, stood trial, was convicted, and the case was under appeal; that he was fighting this accusation which was very evidently used to force him to confess to the murder charge. It would appear ridiculous to charge James with incest if the evidence was sufficient to warrant trying him for the murder where his life was at stake. The accusation and the whole procedure was apparently but another step in the plot by the District Attorney to coerce and extort a confession of some kind from James.

There is nothing in this record whatsoever to justify the statement that James was caught in bed with his niece, and it is entirely immaterial in the case here except that it shows the respondent's unfair effort to prejudice even this Court.

Respondent's position in the face of the above record with reference to the third degree confession is that James was not beaten, threatened, coerced, frightened, questioned until he fainted, and confessed because of a fear of a recurrence of such beatings, but they contend, in effect, that if his confession was obtained by being beaten, threatened, frightened, questioned until he fainted, and because of fear of a recurrence of such beatings, then it should not be considered because it could not be sufficient to be violative of due process of law, because, they say, it was not the sole or principal part of the evidence upon which the conviction rests.

This argument rests upon a misconception of the due process clause of the 14th Amendment as construed by this

Court. *Chambers* v. *Florida*, 309 U. S. 227; 84 L. Ed. 716. The prosecution having used the confession to obtain the conviction in this case cannot now say that it had no influence or effect upon the jury in bringing about the conviction. The contention is an admission that due process was violated. In this respect the respondent's case rests in fallacy. Their whole brief was built up with the idea of attempting to show that this defendant was guilty of the crime charged. Every possible prejudicial influence was brought to bear even in this Court. But as stated by Mr. Justice Roberts in *Snyder* v. *Massachusetts*, due process of law is not concerned with the guilt or innocence of the person charged. See also *Moore* v. *Dempsey*, 261 U. S. 88; 67 L. Ed. 543. Procedural due process of law has been violated if the accused has been denied a fair trial in an American way—if from his lips has been wrung by tortuous methods a statement or confession which is introduced in evidence against him, and which necessarily weighed heavily with the jury in determining his life or his liberty. The people thereafter cannot say that it should be ignored because there was other evidence from which an inference of guilt might be taken. Having taken so much pains and effort to get the confession and thereafter get it introduced in evidence the people must have regarded it as highly important in bringing about a conviction in the case.

But regardless of the confession or its contents, regardless of what the evidence might show, if procedural due process has been violated this Court has held that the accused is entitled to a reversal of the judgment.

In *Snyder* v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674, Mr. Justice Roberts said:

> "A distinction has always been observed in the meaning of due process as affecting property rights, and as applying to procedure in the courts. In the former aspect the requirement is satisfied if no actual injury is

> inflicted and the substantial rights of the citizen are not infringed; the result rather than the means of reaching it is the important consideration. But where the conduct of a trial is involved, the guaranty of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way. Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules, and is not satisfied, if, though the hearing was unfair, the result is just."

In order to bolster up their position respondent then quotes in full the informal confession given to Officer Killion after Killion had bought him a meal, and the formal confession given to the District Attorney, Buron Fitts, at about one-thirty in the morning thereafter.

These confessions are concerned largely with rattlesnakes about which James stated that the officers having him in charge had repeated to him in various forms "a thousand times" until he knew the story by heart that they wanted him to tell.

But the officers were so concerned and interested in the rattlesnakes that they forgot that Mary Emma James died of *drowning*, and the only reference to drowning in James' confession is that Hope told him he, Hope, had thrown Mrs. James in the fish pond. But under well-known rules of law this does not establish the *corpus delicti* of murder by drowning in this case, and the people have failed entirely to establish the crime of murder by drowning of Mary Emma James. Nowhere in either the direct or circumstantial evidence is there any proof that James or his accomplice Hope actually drowned Mary Emma James. This was pointed out in the opening brief, but there was no answer to the factual situation pointed out in appellant's brief that Mrs. James was drowned.

It therefore appears that the conviction of James rests "solely or principally" upon his confession or the alleged confession of his accomplice Hope.

There is a further admission by the respondent that they did not file any charge of murder against the appellant until after they secured the Hope confession which formed the basis of the prosecution, together with James' alleged confession.

It thus appears that the conviction rested upon the confession of James and the alleged confession of Hope, with no other proof anywhere of the corpus delicti in this case.

It further appears that the confession was used as the major portion of the case to bring about James' conviction.

But the respondent says that these issues were presented to the jury. This statement presents the same fallacy as contained in the argument made by counsel in *Chambers* v. *Florida*, 309 U. S. 227, 84 L. Ed. 716; *White* v. *Texas*, 310 U. S. 530, 84 L. Ed. 1342, and *Canty* v. *Alabama*, 309 U. S. 629, 84 L. Ed. 988.

This Court has determined that it will examine for itself the record to see if procedural due process of law has been violated, and upon such determination will upon its own determination reverse the judgment.

An instruction embodied in the case giving the jurors the entire facts regarding the third degree as they appeared from the evidence during the trial was refused by the trial Court in this case. But regardless of what the jury might have determined this Court will determine first and foremost whether under the Constitution of the United States procedural due process of law has been violated and will examine the record for itself. Upon such an examination it is quite apparent that in this case there has been such a violation of procedural due process and that it is necessary to reverse the judgment for that reason.

Further Discussion of the Accusatory Statement.

There was another violation of procedural due process when the defendant was taken out of his "High Power Tank" in the jail and to the Chaplain's quarters on May 2nd, 1936, and there was confronted by Deputy District Attorney Williams, who told him what Hope had allegedly said to him, Williams, and asked James if he had anything to add to the statement.

At that time James had already been warned by his attorney, Mr. Silverman, not to talk to anyone unless he was present. James had repeatedly denied all accusations against him. It was but a few hours later that Officer Killion, accompanied by James, went out to the fish pond where his wife had died and James thereafter taken to the District Attorney's office was again interrogated by officers and members of the District Attorney's staff. James again denied Hope's statement and said it sounded "screwy" to him. It was quite apparent that the accusatory statement made to him by Williams was not free and voluntary and that he was in no position to speak and the use of this accusatory statement against him constituted a violation of procedural due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

Chambers v. *Florida*, 309 U. S. 227;
Peo. v. *Conrow*, 200 N. Y. 356, 93 N. E. 943;
Peo. v. *Pfanschmidt*, 262 Ill. 411.

The District Attorney and his deputies and his officers were all on notice that the defendant was represented by counsel. They were aware of the legal ethics which required a counsel to notify opposing counsel and to deal with opposing counsel and not the client. James was under no duty to speak to the officers or anyone else, and to use this accusatory statement against him violated his constitutional rights under the 14th Amendment.

In *People* v. *Graney*, 48 Cal. App. 773, 775, cited by re-

spondent, it was specifically brought out that the fact that Graney had been advised by his counsel not to talk was not before the trial Court; nor is there a parallel situation in *People* v. *Wilson*, 61 Cal. App. 611, cited by respondent. But even if state cases were to hold that a man is under duty to answer to an accusatory statement after he has conferred with his attorney, and in the absence of his attorney, where he has been instructed not to talk in the absence of his attorney, such procedure we respectfully submit violates due process of law. Because if, as expressed in *Powell* v. *Alabama*, a man is entitled to the right of counsel at all stages of his proceedings, he is entitled to rely on the advice of his counsel and to have the advice and presence of his counsel when proceedings are to be taken which may be used against him. And the fact that he follows that advice is no indication that he is admitting an accusation against him.

Moreover, the procedure herein had violated James' rights against being threatened because if he was required to reply or speak under pain that failure to do so would be used against him, it would be in effect the means of causing him to incriminate himself while threatened even though he followed the advice of his counsel and did not "add anything." This should be a violation of due process of law under the 14th Amendment to the Constitution of the United States, to protect persons and property in this democracy against self-incrimination, under threats, torture and pressure.

But the respondent says that the story told by petitioner was not the same story as that told by Hope, and is subject to suspicion as to its truthfulness. Hope's stories are entirely fantastic. They are the creations of a literary mind—perhaps that of Scott Littleton, who wrote for Liberty Magazine and painted the lurid story of this case in a special article in that weekly publication. Undoubtedly the officers

who told James what to say could not remember all the lurid details they were trying to paint. It did not make any difference to them whether they got James to say Hope killed Mrs. James, or whether Hope said he did it. In either case James would be liable under the laws of California. So any story they might get him to tell which would incriminate himself was all they wanted. It's a similar situation to that in *Bram* v *U. S.* 168 U. S. 532, L. Ed. 568.

But the physicial facts in the case belie the fantastic confessions. The experiments conducted by Dr. Boehme on the guinea pigs showed that the poison of the rattlesnake quickly caused the heart and liver to become black and to shrink. Mrs. James, who, if the rattlesnake story is to be believed, had been bitten some twenty-hours longer before her body was found, had no evidence of any poison in her body whatsoever. Her heart, lungs and liver were all normal. There was no discoloration of these vital organs. Hope testified that Mrs. James was made drunk. But liquor is known to be a counter-action to rattlesnake poison. So if James or Hope had been going to poison her by the means of rattlesnake poison they would not have given her liquor. That her vital organs showed no evidence that they had been affected by the venom of rattlesnakes, as that venom customarily affects human beings and as it affected the guinea pigs upon which the doctor experimented and reported to the court, is a fact to be considered in this case.

Mrs. James had but a single laceration. A rattlesnake fang actually punctures. It suppurates around the puncture after it enters. Besides, a rattlesnake has two fangs, and the laceration on the left toe was but a single mark. The statement in respondent's brief that the coroner's physician stated that he was of the opinion that she had been bitten by a rattlesnake is unsupported in the record. There were no marks of violence upon Mrs. James and no evidence that she was drowned in the bathtub. Just how this could have

occurred or did occur is not explained anywhere in the long record, nor in respondent's brief. When her body was found at the fish pond her lungs were full of water. She still had some clothes on. The letter which was obviously in her handwriting, written to her sister on "old blue Monday," told of her having been bitten by some insect, and it spoke lovingly of her husband. Dr. Alfred Dinsley, a neighbor, saw a woman of Mrs. James' appearance walking around in the yard of her home after Hope claimed she was dead (R. 609). Hope said Mrs. James' mouth was taped and that she was made drunk. Yet there was no evidence of alcohol in her blood nor any tape marks when Dr. Wagner examined her.

In *King* v. *State*, 155 Ga. 707, 118 S. E. 368, the court, in holding a confession made to a fire inspector inadmissible, referred to the principle that no man is required to incriminate himself, and quoted from the Georgia statutes in part as follows:

> "To make a confession admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury."

The court pointed out that no confession came until the State officer told the defendant to come on and make a clean breast of it because, as a rule, courts were light on those who did not give them much trouble, and stated that "voluntary is practically synonymous with spontaneously, of his own free will,—and not when overmastered by the will of another," referred to "the picture of this young defendant, taken by an officer, whose duties are statewide, to the room which the defendant, who lived in Tifton, knew was the room of the judge of the superior court, and, surrounded by the court stenographer and an attesting officer, as well as another person, none of whom perhaps he expected to meet when he accepted the invitation of the State fire inspector

to talk the matter over with him, where, after being grilled for three hours, and being subjected to such a nervous strain that he broke down and cried, and at length, after he was told that he was telling a different story from that told by his wife, and frightened by the statement that he needn't lie, because they had ample evidence to convict him, after being charged with guilt of a crime more heinous than arson—the crime of perjury—after having been sworn before his own examination, with no friend or counsel to advise him of his right and privilege to refuse to swear, he makes the confession which was admitted by the court."

In *People* v. *Vinci*, 295 Ill. 419, 129 N. E. 495, a homicide case, the court reversed a judgment on the ground that a confession was not freely and voluntarily given, and that it was error to receive it in evidence under these circumstances: "Plaintiff in error was questioned during the greater part of three days and four nights by the state's attorney, two of his assistants, his private secretary, and several police officers. While we do not believe any physical force was used, nor that direct threats or promises were made, there can be no doubt at all that the repeated questioning by these officers, like the constant dropping of water upon a rock, finally wore through Vinci's mental resolution of silence. Admittedly his refusal at first to answer incriminating questions gave evidence of a desire to make no statement. The examination was persisted in by turns until plaintiff in error finally yielded to the importunities of his questioners and gave answers which they sought. It seems clear to us that the accused became convinced that he was bound to make a statement to secure relief from the continuous questioning of those having him in charge, and under the circumstances we do not see how a confession thus obtained can be said to be voluntary." The court was of the opinion that the object was not to secure a confession as evidence against the defendant, but to secure

a statement for the purpose of making the defendant a witness for the prosecution of the crime.

In *People* v. *Sweeney*, 304 Ill. 502, 136 N. E. 687, the court, in holding that statements of the defendants were erroneously admitted in evidence, said:

> "There was no denial of the charge that these men, from the time of their arrest until the time that the statements were made, were continuously subjected by the state's attorneys and the officers having them in custody to prolonged questioning at unusual and unreasonable hours; that they were not allowed to sleep, that they were not given necessary food, and that they were beaten."

In *State* v. *Albert*, 50 La. Ann. 481, 23 So. 609, the court reversed a conviction of two defendants on account of the admission against them of confessions made after prolonged questioning, and after one of the defendants had been taken to the place of the supposed crime. The court said:

> "Their arrest, and being heavily handcuffed and incarcerated in separate cells of the jails, where they were repeatedly interrogated and plied by their keepers with numerous questions, separate and apart from each other, with direct reference to the charges preferred against them, coupled with the injunction that it were better for them that they should tell the truth, is clearly indicative of an undue influence having been brought to bear upon them, for the purpose of eliciting proofs of their guilt."

In *Flagg* v. *People*, 40 Mich. 706, 3 Am. Crim. Rep. 70, the court, in reversing a conviction on account of the erroneous admission in evidence of a confession, said:

> "When a party under arrest is told by the officer that the best thing he can do is to own up,—that he had better make a statement,—when it is supposed

> that a statement can be forced—'knocked'—out of him because 'he was a weak one;' when intoxicating liquors are furnished him to aid in the forcing process; and when, on the following morning, he is taken in irons to the office of an attorney, and there, in the presence of those hostile to him, with bolted doors, is interrogated, his answers reduced to writing and sworn to, it is idle to say that such a confession was free and voluntarily made, even although the witnesses may testify that no inducements were made or held out to him."

The court further characterizes the offense committed in the efforts to extort a confession as a "perversion of the process of the law,—'a poisoning of the fountains of justice.'"

In *People* v. *Wolcott*, 51 Mich. 612, 17 N.W. 78, the court, in holding the admission of a confession erroneous, said: "In the middle of the night, after the officer who had arrested him had retired for much-needed rest, the respondent, instead of being allowed the like privilege of rest, was visited by three persons in succession, whose mission appears to have been to obtain confessions by impressing upon the mind of the respondent that it would be better for him, or he would get off easier, if he made confession. None of these persons was the officer in charge; but their admission to the cell at such an unreasonable hour carried with it an implication of the officer's consent to their mission, and respondent could scarcely fail to be impressed that their assurances were made with full authority. No reliance can be placed upon admissions of guilt so obtained, for the very obvious reason that they are not made because they are true, but because, whether true or false, the accused is led to believe that it is for his interest to make them."

In *People* v. *Prestidge*, 183 Mich. 80, 148 N. W. 347, where the court held that a confession was erroneously

admitted which was made after a severe sweating or grilling for upwards of two hours by the sheriff, the undersheriff, and the prosecuting attorney, it was said: "The respondent states that during the time of the examination he was very nervous and nearly crazy. It is not incredible that he should have been in that condition at the end of two or three hours of grilling such as he received. It is needless to argue that a statement made under such pressure is voluntary, whether it is true or false."

In *People* v. *Brockett*, 195 Mich. 169, 161 N. W. 991, the court held the admission of a confession of a defendant, nineteen years old, erroneous. He was arrested on Tuesday night, and kept for two days in a cell with a cement floor and no bed; during this time he was taken into the office of the chief of police for a number of interviews, and on Thursday he made a confession in the presence of the assistant prosecuting attorney, the chief of police, and detectives. The court said, *inter alia:*

> "Proof of a confession is never admissible unless it is voluntarily made, and by the word 'voluntary' is meant that the confession must be of the free will and accord of the defendant, without coercion, whether from fear of any threat of harm, promise or inducement by hope of reward, or method known as 'sweating'. In our opinion the means used, by the uncontradicted evidence in the instant case, must have so agitated the mind of the defendant as to arouse his fear, and to have a coercive effect. Therefore the confession was not voluntary."

In *People* v. *McCullough*, 81 Mich. 25, 45 N. W. 515, it was held that it was error to admit in evidence a letter written by a police captain under the prisoner's dictation, where the police took the prisoner into a room and vigorously examined and cross-examined him, his counsel being in an outer office and not permitted to see him until the

letter and another statement were secured. The court stated that confessions must be "voluntary and without any influence being exerted by the officer, either of threats, promise, artifice, or duress."

In *Robertson* v. *State*, 81 Tex. Crim. Rep. 378, 6 A. L. R. 853, 195 S. W. 602, where the district attorney verbally abused and threatened the defendant and obtained his confession after about an hour's interview, it was held that the confession was not voluntary, as a voluntary confession ought to be voluntarily given, and not forced or extorted in any

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In *People* v. *Rogers*, 303 Ill. 578, 136 N. E. 470, where the court affirmed a conviction where confessions had been excluded, it quoted from a newspaper reporting the statements of a police official, and the court, in a comment on the matter of securing confessions, said, *inter alia:*

> "It is the most dangerous and the most uncivilized practice imaginable to allow the police to go out and arrest a man or a boy upon mere suspicion that he has committed a crime, and for days subject him to the sweating process and to violence until he finally gives up and confesses in order to escape the torture to which he is being subjected."

In *State* v. *Thomas*, 250 Mo. 189, 157 S. W. 330, the Court said:

> "Officers, in trying to secure confessions or admissions from a party suspected of crime, should not forget that they have no legal right to compel a person under arrest to make any statement whatever,—that no one can be compelled to furnish evidence against himself; and where the interrogatories are persisted in to an unreasonable extent, thereby producing mental anguish on the part of accused, the confession or admission thus obtained should be wholly rejected as

> involuntary, the same as if it had been obtained by the infliction of physical torture. * * * We are aware that it is generally held that the constitutional guaranties against being compelled to testify against one's self do not apply to facts elicited by an officer through interrogatories propounded to a prisoner out of court, but we are convinced that the distinction is often more apparent than real. Both the Federal and state Constitutions are always liberally construed so as to prevent compulsory self-crimination."

In *Bianchi* v. *State*, 169 Wis. 75, 171 N. W. 639, it was held to be error to admit statements of the defendants, who had been taken to the office of the district attorney and had been sworn and examined by him and their testimony reduced to writing, the court observing:

> "In our criminal jurisprudence there is no room for such procedure."

The court considered that the defendants were ignorant of the illegality of the proceeding, and the district attorney failed to advise them of their constitutional right. In *Davis* v. *U. S.*, 32 F. (2d) 860 a confession obtained from an Indian was held inadmissible because he was taken to the morgue beforehand.

These cases have now been given meaning and force under the Fourteenth Amendment to the Constitution of the United States in:

Chambers v. *Florida*, 309 U. S. 227; 84 L. Ed. 988;
Brown v. *Mississippi*, 297 U. S. 278;
Canty v. *Alabama*, 209 U. S. 629;
White v. *Texas*, 310 U. S. 530; 84 L. Ed. 1342.

We respectfully submit the same authorities require reversal of the judgment of the case at bar.

The Rattlesnake Evidence.

Respondent says with reference to the bringing of the rattlesnakes into the courtroom that it was done in a quiet and orderly manner. Then, respondent says, they were kept there only for the length of time necessary for their identification as exhibits in the case and for inspection by the jury, and as soon as practical they were quietly removed from the courtroom. This very statement is an admission by the respondent that the rattlesnakes necessarily had an inflammatory effect and that it was necessary to remove them as soon as inspected in the courtroom. Respondent says the snakes were left only long enough to permit the jury to observe them for their evidentiary value. Respondent says that it was permissible to bring the snakes in if the ends of justice could be furthered by their production. But wherein were the ends of justice furthered by the production of the snakes? Respondent has failed to point out in anywise how the production of the snakes could aid the jury in the determination of the issue.

What did the snakes prove that could not be proved without them? If snakes are produced solely for the purpose of agitating the jury's feelings, they cannot be used for any purpose whatsoever.

Respondent cites what he calls an analogous case (R. 144). He says that if someone had attempted to kill a person with a hammer and had failed and had shot the person in the head with a revolver, would it be contended that the hammer found by the side of the victim could not be produced? What the respondent has offered is not the hammer (or snake) beside the victim but the case containing the carpenter's tools, nowhere near the victim. Respondent forgets that it is not the whole rattlesnake which it is claimed went into the foot of the deceased, but the fang. If respondent had produced only the fang and showed that it entered

into the wound, then perhaps, coupled with satisfactory expert testimony, there might have been some evidentiary value to it. But to produce the rattlesnake in a glass-encased box nowhere near the victim and not used to frighten her into drowning could have had no other purpose than to inflame the passions and prejudices of the jury and to prove nothing in the case. Whether a person is bitten by a snake or otherwise is only subject to expert testimony of medical men and where the subject matter is peculiarly within the knowledge of experts a jury must be guided by expert opinion. The snakes therefore could in no way aid. And the only thing about the snakes which were exhibited that could have affected the jury in any way was the rattling, frightening and horrifying nature of the snakes, and that was to horrify the jury.

Respondent relies on the trial judge's determination that no prejudice resulted to the defendant from the bringing into the courtroom of the rattlesnakes. But if the trial judge was to determine this case then there would be no need for appeal. This court has frequently said that it will determine for itself whether the constitutional rights under the Constitution of the United States have been violated. This is the same argument that has been made with reference to the jury's determination regarding third degree methods and other constitutional questions which have been before this Court.

As pointed out in the dissenting opinion of the late Justice Seawell, there are some things of which the Court can take judicial knowledge and the bringing in of rattlesnakes and its effect on the ordinary mind is one of those things.

The very argument made by the respondent, respondent says there is absolutely no evidence to the effect that any person either on the jury or off the jury was in the slightest degree agitated either by the presence of the snakes or the manner of bringing them into the courtroom.

The evidence in this record shows that W. J. Clark, one of the attorneys in the case, made an affidavit describing the wave of terror that prevailed in the courtroom. But Mr. Clark did not rely alone on his own observations of the wave of terror that swept the courtroom. He quoted from two of the large daily newspapers in general circulation in the city of Los Angeles. These observations were made by paid observers whose profession and business it is to record their observations in judicial proceedings for the general public.

The Herald Express described the scene as follows:

> "Buzzing their hollow rattles so loudly that women in the crowded courtroom shivered and shuddered at the eerie, frightening sound, as two diamond-backed rattlesnakes, glittering in their new skins today were placed on the counsel table in Superior Charles W. Fricke's court, where Robert S. James, the Birmingham barber, crouched ghost-faced and jittery at his trial for the murder of his golden-haired wife Mary."

The Examiner described the scene as follows:

> "A diamond-backed rattlesnake hissed and struck before the trial jury as the long glass box was borne forward like a hideous offering of a black ritual."

The newspapers had also interviewed the jurors after the case was concluded, as to how they happened to reach their verdict, and here is what the jurors said:

Harold W. Hart, one of the jurors, said:

> "James had been convicted in my own mind ever since they brought the rattlesnakes into the courtroom, showed them to us, and then introduced witnesses who told us that James had actually stuck his wife's foot into a box containing one of those serpents and had watched it strike her."

Mrs. Ollie Sype said:

> "The sight of the rattlesnakes which were exhibited as the weapons by which Robert James did his wife to death stunned me. It was the most shocking experience of my life."

There was no attempt on the hearing of the motion for a new trial to strike out these affidavits, nor was there any denial in the affidavit of Eugene D. Williams of statements made by the jurors. Williams' affidavit admits that there was a commotion, but gives his version of the commotion.

Respondent claims that the rattlesnakes were relevant to the issues and admissible as part of the *res gestae*, but he does not point out wherein they were necessary to establish the cause of death by drowning nor to establish the *res gestae* in this case. Nor does he point out why any two rattlesnakes would not have served the same purpose; nor in fact why any hundred rattlesnakes would not have subserved the same objective. Any other two rattlesnakes that the people might have produced would have had the same shocking effect upon the jurors.

In *Commonwealth* v. *Carl*, 87 Pa. Sup. Ct. exhibited a dog, alleged to be dangerous, and vicious, was held properly excluded, in a trial for harboring a nuisance.

See the following cases, *Dozier* v. *State*, 82 Tex. Cr. Rep. 321, 199 S. W. 287; *Lucas* v. *State*, 50 Tex. Cr. Rep. 219, 95 S. W. 1055; *Grace* v. *State*, 88 Tex. Cr. Rep. 301, 225 S. W. 751; *State* v. *Gaffy*, 30 S. D. 548, 210 N. W. 980; *Louisville & N. R. Co.* v. *Pearson*, 97 Ala. 211, 12 So. 176; *Perry* v. *Metro. St. Ry. Co.*, 68 App. Div. 351, 74 N. Y. S. 1; *Newman* v. *State*, 85 Tex. Cr. Rep. 556, 213 S. W. 651. See also, *Sutherland* v. *State*, 24 Ala. App. 573, 139 So. 110.

The Colorado Evidence.

Examination of the evidence produced regarding the death of James' former wife in Colorado reveals that it would be insufficient taken as a whole to establish any crime in Colorado. We have set it up in full in the record in this case because it forms such a large portion of the present trial other than to prejudice him. *Peo.* v. *Glass*, 158 Cal. 650. The respondent says that the taking of the life of Winona James occurred as a result of a scheme executed partly in California and partly in Colorado. The record does not bear out respondent's statement that any part of the alleged scheme was executed in California. And respondent does not point out any such evidence. It is true that Winona James was finally buried in California and that James filed his claims for insurance after he arrived in California, but all events leading up to her death were outside of the State of California. This is the first time that this novel doctrine has been advanced in this case by the respondent. Nothing that happened in the case would bring them within the doctrine entitling a person to be tried within the vicinage where a crime is alleged to have occurred. At common law where a crime occurs partly in one county and partly in another, it could be tried in neither county (*People* v. *Powell*, 87 Cal. 348). While this doctrine has been modified to the extent of permitting a trial it must nevertheless take place in the county where the death occurred (*People* v. *Powell*, 87 Cal. 348).

The statement made that the process of the court was available to petitioner (p. 173, Respondent's Brief).

Respondent relies on the fact that James was questioned prior to his indictment about the death of Winona James. This is certainly no notice to him that he is going to be tried in the California courts for it. They also rely on the fact

that at the commencement of the trial the opening statement of the people indicated that testimony of this kind would be offered. The record here does not disclose the opening statement, and it did not appear in the original record filed with the Supreme Court of the State of California. But the opening statement of the prosecutor has never in and of itself been regarded as notice of the charge of which an accused must be informed to meet. It is the indictment where bills of particulars are permitted as they are in the Federal courts. Bills of particulars have been permitted to supplement, at least to some extent, the charge in the indictment so that an accused may have sufficient notice at the time of trial to be prepared to meet the charges. California proceedings do not provide for any bills of particulars, and under such circumstances there is no notice to the accused.

The processes of the courts of California, contrary to the statement of the respondent, were not available to the appellant. Depositions are not confrontation, and an effort to convict by means of deposition have been held to be in violation of due process of law.

In *Dowdell* v. *U. S.*, 221 U. S. 326, 329, 55 L. Ed. 757, the court said:

> "This is substantially the provision of the 6th Amendment of the Constitution of the United States, which provides that the accused shall enjoy the right to a speedy and public trial, and to be confronted with the witnesses against him. This provision of the statute intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused *upon deposition* or *ex parte* affidavits, and particularly to preserve the right of the accused

to test the recollection of the witnesses in the exercise of the right of cross-examination. Mattox *v.* United States, 156 U. S. 237, 242, 39 L. Ed. 409, 410, 15 Sup. Ct. Rep. 337; Kirby *v.* United States, 174 U. S. 47, 55, 43 L. Ed. 690, 693, 19 Sup. Ct. Rep. 574, 11 Am. Crim. Rep. 330; 2 Wigmore, Ev. sec. 1396, 1397." (Italics added.)

Proof on one alleged murder is never to be established by an alleged murder in another ~~case~~ state, in any case unrelated to the case on trial, ~~and has never heretofore been permitted in any case as a similar offense~~.

Respondent seriously contends that even though it may be that the due process of law clause of the Federal Constitution was violated by the prosecutor when he introduced a mass of evidence to prove that the appellant had committed another murder in another vicinage and State, years before, a charge of which he had no notice, no opportunity to prepare to defend and no process through which he could produce witnesses,—that even then, the conviction will be upheld unless it "affirmatively appear" that the error was so gross as "to amount to no trial at all."

None of the cases cited to uphold this proposition are in point.

Three of them involve the taking of property allegedly without due process of law. These are *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 30 L. Ed. 243; *American R. Ex. Co.* v. *Kentucky*, 273 U. S. 269, 71 L. Ed. 639; *Roberts* v. *New York*, 295 U. S. 264, 79 L. Ed. 1429.

It is only necessary to refer to *Snyder* v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674, to distinguish these authorities, wherein it is said that a different rule applies to the issue presented where it is claimed that property has been taken in violation of the 14th Amendment than where in criminal cases life or liberty has been taken in violation of that amendment through the procedural process employed, and

that in the latter case it is enough that it appears that the constitutional safeguard has been violated,—the judgment will be reversed.

Respondent's other two authorities were criminal cases but in neither was it held that any constitutional right was violated at all.

In each of these cases it was held that the action of which complaint was made was, if the complaint were justified, merely an erroneous ruling on a matter which did not violate any constitutional right.

These cases are *Re Converse,* 137 U. S. 624, 34 L. Ed. 796, and *Howard* v. *Kentucky,* 200 U. S. 164, 50 L. Ed. 421.

In the *Converse* case the trial court ruled that the word "agent" in a statute, included "attorney". In the *Howard* case the defendant expressly waived his right to be present while one juror was being selected. The juror was excused by the court. Hence no claimed constitutional right was violated.

No language used in any one of these decisions in the slightest degree supports respondent's proposition for which they are cited.

In *Peo.* v. *Powell,* 87 Cal. 348, the court said:

"Mr. Cooley, in his work on Constitutional Limitations, in discussing the effect of such a constitutional provision as ours, says:

> "Accusations of criminal conduct are tried at the common law, by jury; and wherever the right to this trial is guaranteed by the Constitution, without qualification and restriction, it must be understood as retained in all those cases which were triable by jury at common law, and with all the common law incidents to a jury trial, so far, at least, as they can be regarded as tending to the protection of the accused. * * * Many of the incidents of a common-law trial by jury are essential elements of the right. The jury must be

indifferent between the prisoner and the Commonwealth; and to secure impartiality challenges are allowed, not only for cause, but also peremptory, without assigning cause. The jury must also be summoned from the vicinage where the crime is supposed to have been committed; and the accused will thus have the benefit, on his trial, of his own good character and standing with his neighbors, if these he has preserved; and also of such knowledge as the jury may possess of the witness who may give evidence against him. He will also be able, with more certainty, to secure the attendance of his own witnesses." Cooley, Const. Lim. 5th ed. 390-393.

This same doctrine, and the reasons for upholding it, are more fully stated by the same learned author and judge in the case of *Swart* v. *Kimball*, 43 Mich. 448, in which it is said:

"The Constitution of the State provides that 'the right of trial by jury shall remain, but shall be deemed to be waived in all civil cases, unless demanded by one of the parties in such manner as shall be prescribed by law.' Article 6, Sec. 27. The right to remain. What right? Plainly the right as it existed before—the right to a trial by jury as it had become known to the previous jurisprudence of the State. Underwood *v.* People, 32 Mich. 1. The right is not described here; it is not said what shall be its incidents; it is mentioned as something well known and understood, under a particular name; and by implication, at least, even a waiver of its advantages is forbidden. If the accused himself cannot waive them, plainly the Legislature cannot take them away. The next section of the Constitution repeats the guaranty of this method of trial 'in every criminal prosecution,' and nothing is better settled on the authorities than that the Legislature cannot take away a single one of its substantial and beneficial incidents (Opinions of Justices, 41 N. H. 550; Ward *v.* People, 30 Mich. 116); and even the accused cannot waive any one of the essentials. Work *v.* State, 2 Ohio

St., 296; Cancemi *v.* People, 18 N. Y. 128; Hill *v.* People, 16 Mich. 351; Allen *v.* State, 54 Ind. 461. Now that in jury trial it is implied that the trial shall by a jury of the vicinage is familiar law. Blackstone says that the jurors must be 'of the *visne* or neighborhood, which is interpreted to be of the county where the fact is committed.' 4 Com. 350. This is an old rule of the common law (2 Hawk, P. C., chap. 40; 2 Hale, P. C. 264); and the rule was so strict and imperative that if an offense was committed partly in one county and partly in another, the offender was not punishable at all (2 Hawk, P. C. chap. 25; 1 Chitty, Cr. L. 177). This overnicety was long since dispensed with, but the old rule has in the main been preserved in its integrity to this day. It is true that Parliament, as the supreme power of the realm, made some exceptions, which are enumerated by Mr. Chitty in his treatise on Criminal Law (vol. 1, p. 179), the chief of these being cases of supposed treason or misprision of treason examined before the privy council, and which under the Statute of Hen. VIII. might be tried in any county, and offenses of the like character committed out of the realm, and which by a statute of the same arbitrary reign were authorized to be tried in any county in England. But it is well known that the existence of such statutes with the threat to enforce them was one of the grievances which led to the separation of the American colonies from the British empire. If they were forbidden by the unwritten constitution of England, they are certainly unauthorized by the written Constitutions of the American States, in which the utmost pains have been taken to preserve all the securities of individual liberty. It has been doubted in some States whether it was competent even to permit a change of venue on the application of the State, to escape local passion, prejudice and interest (Kirk *v.* State, 1 Coldw. 344; Osborn *v.* State, 24 Ark. 629; Wheeler *v.* State, 24 Wis. 52); but this may be pressing the principle too far (State *v.* Robinson, 14 Minn. 447 (Gil. 333); Gut *v.* Minnesota, 76 U. S. 9 Wall. 35, 19 L. Ed. 573); but no one doubts that the right to a trial by a jury of the vicinage is as complete and cer-

tain as it ever was, and that in America it is indefeasible (1 Bishop, Cr. L. (2d ed.) Sec. 552; Wharton, Cr. L. Sec. 277; Paul *v.* Detroit, 32 Mich. 108; Ward *v.* People, 30 Mich. 116)."

The use of Colorado evidence has deprived this appellant of trial in the vicinage and

The use of the Colorado evidence has thus further deprived appellant of notice and opportunity to be heard, as required by due process of law.

Powell v. *Alabama*, 287 U. S. 45;
Mooney v. *Holohan*, 294 U. S. 102, 79 L. Ed. 794;
Holden v. *Hardy*, 169 U. S. 366.

The Right of Counsel.

We have discussed this question in our opening brief, and under other headings herein but wish to call the attention of this Court to the immigration case of *Ex parte* Chin Loy You, 223 Fed. 833, where the person asked for counsel and was refused he was denied all the incidents of a fair proceeding.

The Hope Repudiation.

Hope's repudiation was before the court of California. It is before this Court. It is supported by ample facts and circumstances warranting the reversal of the judgment. The suggestion of respondent that appellant, if he has anything further, present another writ, reminds us of the California case of *Peo.* v. *Smith* from this very trial court. Smith was hanged admittedly by mistake while waiting for his appeal to be decided. So here, unless the judgment was reversed, petitioner would be hanged while waiting for new matters.

But the affidavits of Hope are uncontradicted, and entitle petitioner to the reversal prayed for.

The Equal Protection of the Laws.

Respondent mistakes the meaning of this provision of the Fourteenth Amendment. It was designed to protect any person—not any class of persons. Besides, respondent's case would seem to mean that he contends that district attorney's officers and deputy sheriffs and police are individuals. But they are state agents, and their action is the action of the state. *Mooney* v. *Holohan*, 79 L. Ed. 794. And if they deny to any individual the protection and blessings of equal treatment that individual has been denied the equal protection of the laws. State action of any kind, which is unequal, is voided.

Conclusion.

What we have said in this closing brief has been unusually long, because of the length of respondent's brief.

Respondent has had an unfair trial. He has been convicted in an un-American way. He was unfairly taken to a house next door by police officers instead of jail and struck by such officer. He was held incommunicado for two days and nights and continuously questioned without sleep or food. He was lodged in the High-power tank of the jail. He was thereafter without notice to his counsel removed from the cell and taken to a private room and there, without friends or counsel, in the presence of Hope, handcuffed to an officer, accused of the crime of murder and asked if he had anything to add to it, and in violation of his right of self-incrimination, his silence was used against him as an admission of guilt; he was taken to the scene of the death of his wife, then back to the district attorney's office and questioned incessantly until he asked for food and then told "the story." This was used in evidence against him. Two live hissing rattlesnakes were brought into the courtroom to inflame the passions and prejudices of the jury.

Evidence regarding the death of a former wife in Colorado were produced by the state, without notice, without opportunity to meet it, without the right or confrontation of the witnesses guaranteed by the statutes of California, and without the processes of the court to bring them to California.

Much other prejudicial matter was introduced in the case.

Hope's testimony, repudiated by him, was refused favorable consideration by the court.

And the petitioner was denied the right of counsel when he requested the same, and when it would have been of most benefit to him.

Such procedure, we respectfully submit, violates procedural due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

It resulted in a trial that was a mock and sham. It blended rattlesnake venom with a pretended verdict.

In America, it is the law that if a defendant cannot be convicted fairly he should not be convicted at all and where there has been an unfair, un-American trial the judgment must be reversed.

Chambers v. *Florida*, 309 U. S. 227; 84 L. Ed. 716;
Moore v. *Dempsey*, 261 U. S. 88; 67 L. Ed. 543;
Powell v. *Alabama*, 287 U. S. 45; 77 L. Ed. 158;
Brown v. *Mississippi*, 297 U. S. 278; 80 L. Ed. 672;
Mooney v. *Holohan*, 294 U. S. 102; 79 L. Ed. 794.

Respectfully submitted,

Morris Lavine.